BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GONZALO LIRA, JR.	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,067,794
PREFERRED PERSONNEL, INC.	)	
Respondent	)	
AND	)	
	)	
RIVERPORT INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the January 29, 2014, preliminary hearing Order entered by Administrative Law Judge (ALJ) Gary K. Jones.

APPEARANCES

Charles W. Hess, of Wichita, Kansas, appeared for the claimant. Kirby A. Vernon, of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held January 23, 2014, with exhibits attached and the documents of record filed with the Division.

ISSUES

The ALJ denied claimant's preliminary hearing requests finding he was reckless by not wearing safety glasses while working, which is a violation of respondent's workplace safety rules and regulations. The ALJ wrote that a reckless act is one that is beyond mere negligence, that it is an act or omission that involves a conscious disregard of a known or obvious risk. The ALJ determined the risk that an object may hit claimant in the eye if safety glasses are not worn is an obvious risk. The ALJ found the provisions of K.S.A. 44-

501(a)(2) do not apply, and pursuant to K.S.A. 44-501(a)(1)(D), compensation must be denied to claimant.

Claimant appeals, arguing his decision to work without safety glasses does not rise to the level of reckless. He contends his safety glasses were stolen during his lunch break and because of his work release he was unable to get to Preferred Personnel to obtain a new pair, and the office at Perfection Truss was not open during his shift. Claimant requests review of whether he recklessly violated respondent's workplace safety rules and regulations. Claimant argues the Board should reverse the ALJ and find his claim compensable and authorize medical care and treatment, temporary total disability benefits and payment of outstanding medical bills.

Respondent argues the ALJ's Order should be affirmed as claimant's injury resulted from his reckless failure to wear the safety glasses required by Perfection Truss' safety rules despite the obvious risk that he could be injured by an object that might hit him in the eye.

Issues on Appeal

1. Did claimant recklessly violate respondent's workplace safety rules and regulations?;

2. Is claimant entitled to medical care and treatment and temporary total disability benefits?

FINDINGS OF FACT

Claimant obtained work with Perfection Truss through respondent, Preferred Personnel. Perfection Truss builds wood trusses for residential companies. Claimant's assignment with Perfection Truss began on October 1, 2013. At the time claimant was incarcerated, but was involved in a work release program. He suffered an injury to his left eye on October 18, 2013, while he was taking a metal plate off a truss he was building. A piece of metal flew up and struck claimant in the left eye. He was not wearing safety glasses at the time.

Claimant knew, when he was assigned to the job, he would need safety glasses. At hire, he purchased a pair along with a tape measurer and hammer, all required supplies for the job. Claimant signed a document indicating he was aware of all of the safety rules and acknowledged the document required that he follow all safety rules and guidelines at all times. An attached sheet shows he purchased safety glasses. Claimant testified he was not wearing his purchased safety glasses on the day of the accident because they had been stolen the day before, during his lunch break at around 8:30 p.m. Claimant testified that on October 17, 2013, when he reported to, his supervisor, Brad, that his glasses had been stolen, he was laughed at and told that it was BS. He was not offered another pair

of glasses and was not told at that time he could not work if he didn't have any glasses. Claimant testified that not all of the employees wore safety glasses, and he never saw a sign in the work area indicating safety glasses were required, so he thought he would be alright to finish his shift without his safety glasses. Claimant testified he also reported the stolen glasses to another supervisor named Jose, on October 18, 2013, and was again laughed at. Neither supervisor offered claimant replacement glasses, nor did they direct claimant to where he could obtain replacement glasses. On cross-examination claimant acknowledged if glasses had been available, "they would have given them to me."[1]

Claimant testified he had planned to purchase new glasses as soon as he found the time. However, before that could happen he was injured. Claimant testified he knew he could get more glasses, but thought he had to go through Preferred Personnel, which was not open at the time he needed them. He testified that the office to purchase supplies at Preferred Personnel is not open during the night shift, which is 4:00 p.m. to 12:00 a.m. He knew Perfection Truss had a supply of safety glasses, but he claims to not know he could have purchased another pair from them. He also never asked Perfection Truss if he could buy a pair of glasses. He went through all of this knowing the policy required him to wear safety glasses while working. Claimant testified that because he was on work release for a DUI he was not able to leave the premises or call Preferred Personnel to see about getting new safety glasses.

Claimant was initially seen at Wesley Medical Center for his left eye injury. He had surgery on his left eye with Kumar Dalla, M.D. He continues to receive medical care and treatment with Tamim Qaum, M.D. Claimant was off work from October 19, 2013, to January 13, 2014.

Freda Schueneman, a recruiter for Preferred Personnel, testified her job is to interview and hire individuals for their clients. Ms. Schueneman has worked for Preferred Personnel since March 3, 2005, having a close relationship with the supervisors at Perfection Truss. She testified that she had knowledge of the many departments at Perfection Truss and what they required of their employees. She testified that all of the departments at Perfection Truss require their employees to wear safety glasses. This information was relayed to her by Milo, Jose and Ben, all supervisors at Perfection Truss and from her boss at Preferred Personnel.

Ms. Schueneman was the one who provided claimant with the safety information form claimant was required to sign. She explained that he must wear safety glasses, have a tape measurer and a have a hammer to perform the job duties. She informed claimant that these items would be provided to him, and Preferred Personnel provides replacement equipment to employees for a fee. She testified Preferred Personnel takes boxes of glasses, hammers and tape measurers out to Perfection Truss on Fridays for employees

[1] P.H. Trans. at 26.

to obtain supplies. She indicated that having boxes of supplies sent over to Perfection Truss is done to accommodate those like claimant, who work second shift, which starts at 4:00 p.m. and may not have the chance to leave Perfection Truss to obtain replacement materials. She testified these materials can be obtained in the office at Perfection Truss. If Perfection Truss contacted Preferred Personnel about needing a new box of safety glasses, hammers or tape measures, her boss would get them to Perfection that same day.[2]

Ms. Schueneman indicated there is no excuse for anyone not to have safety glasses. Ms. Schueneman indicated that when she learned claimant sustained injury to his left eye as a result of not wearing safety glasses she was surprised because Preferred Personnel keeps a steady supply of safety glasses at Perfection Truss. She indicated that during the four or five times she visited Perfection Truss, she never saw anyone not wearing safety glasses. Perfection Truss' policy required all workers to wear safety glasses.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2013 Supp. 44-501b states in part:

> (a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.
> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2013 Supp. 44-501 states in part:

> (a)(1) Compensation for an injury shall be disallowed if such injury to the employee results from:
> (A) The employee's deliberate intention to cause such injury;
> (B) the employee's willful failure to use a guard or protection against accident or injury which is required pursuant to any statute and provided for the employee;
> (C) the employee's willful failure to use a reasonable and proper guard and protection voluntarily furnished the employee by the employer;

[2] P.H. Trans. at 36.

> (D) the employee's reckless violation of their employer's workplace safety rules or regulations; or

K.S.A. 2013 Supp. 44-501(a)(2) states:

> (2) Subparagraphs (B) and (C) of paragraph (1) of subsection (a) shall not apply when it was reasonable under the totality of the circumstances to not use such equipment, or if the employer approved the work engaged in at the time of an accident or injury to be performed without such equipment.

Claimant alleges other workers at Perfection Truss would be allowed to work without safety glasses. However, the policy states otherwise, and Ms. Schueneman testified she has never seen a worker at Perfection Truss working without glasses. Claimant testified that two supervisors laughed at him when he told them his glasses had been stolen. However, he also acknowledged they would have given him glasses if the glasses had been available. On direct-examination claimant failed to allege the supervisors offered or indicated a willingness to give him replacement glasses. Claimant also testified he planned to obtain replacement glasses when he found the time. Yet, the accident occurred the day after his glasses were stolen. Claimant's only explanation for why he had not obtained the glasses was that he was on work release. This does not explain his failure to obtain the glasses at the beginning of his work shift on October 18, 2013, the date of the accident.

It is troublesome that neither Brad nor Jose, claimant's supervisors, testified in this matter. Either would have been able to confirm or dispute claimant's allegations that he informed them of the stolen glasses and what action was or was not taken at that time. However, the fact that Perfection Truss had a strict policy requiring safety glasses was testified to by Ms. Schueneman. The policy statement signed by claimant required that all safety rules be followed at all times. Wearing safety glasses was a required safety policy. Claimant acknowledged being aware of that fact.

This record does not indicate the number of employees at Perfection Truss or the proximity of the supervisors to the workers. Whether claimant could have been observed working without the safety glasses by a supervisor is unclear. What is clear is the conflict between the testimonies of claimant and Ms. Schueneman regarding the enforcement of the safety glass policy. Claimant indicated a lax enforcement, while Ms. Schueneman testified to a strict enforcement of the policy.

Claimant has proven the accident to his left eye occurred while he was working at Perfection Truss. Thus, the initial burden of proving he suffered an accident which arose out of and in the course of his employment has been established. "Once the claimant has

met his or her burden of proving a right to compensation, the burden of proving an employer's relief from that liability through K.S.A. 44-501(d)(2) is upon the employer."[3]

K.S.A. 2010 Supp. 44-501(d)(1) states:

> If the injury to the employee results from the employee's deliberate intention to cause such injury; or from the employee's willful failure to use a guard or protection against accident required pursuant to any statute and provided for the employee, or a reasonable and proper guard and protection voluntarily furnished the employee by the employer, any compensation in respect to that injury shall be disallowed.

Prior to May 15, 2011, employers had the burden of showing a claimant's failure to use a guard or protection was "from the employee's ***willful*** failure . . . ." (emphasis added).

The Kansas legislature modified that burden with the implementation of the new Workers Compensation Act on May 15, 2011. Along with the original willful failure burden, a new element was added. Effective with the new Act, the employer had only to prove that the employee's actions were a "reckless violation of their employer's workplace safety rules or regulations, ..."

The Kansas Court of Appeals, in *Carter*[4], stated that a violation of instructions alone is not enough to render an employee's actions "willful" as a matter of law. The Court held:

> For a violation of instructions to be "willful" under K.S.A. 44-501(d), it must include "the element of intractableness, the headstrong disposition to act by the rule of contradiction." *Bersch v. Morris & Co.,* 106 Kan. 800, 804, 189 Pac. 934 (1920).[5]

The burden of a "reckless violation" appears less strict than that imposed by the "willful failure" burden. In *Wiehe*[6], the Kansas Supreme Court quoted Restatement (Second) of Torts § 500 (a) (1965), pp. 587-588:

> "**Types of reckless conduct.** Recklessness may consist of either of two different types of conduct. In one the actor knows, or has reason to know . . . of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk. In the other the actor has such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk

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[3] *Foos v. Terminix*, 277 Kan, 687, Syl ¶2, 89 P.3d 546 (2004).

[4] *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

[5] *Id.*, Syl. ¶6.

[6] *Wiehe v. Kukal*, 225 Kan. 478, 483-84, 592 P.2d 860 (1979).

> involved, although a reasonable man in his position would do so. An objective standard is applied to him, and he is held to the realization of the aggravated risk which a reasonable man in his place would have, although he does not himself have it.
>
> "For either type of reckless conduct, the actor must know, or have reason to know, the facts which create the risk. . . .
>
> "For either type of conduct, to be reckless it must be unreasonable; but to be reckless, it must be something more than negligent. It must not only be unreasonable, but it must involve a risk of harm to others substantially in excess of that necessary to make the conduct negligent. It must involve an easily perceptible danger of death or substantial physical harm, and the probability that it will so result must be substantially greater than is required for ordinary negligence."

K.S.A. 2013 Supp. 21-5202 states in part:

> (j) a person acts "recklessly" or is "reckless," when such person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.

The ALJ, who witnessed the testimony of both claimant and Ms. Schueneman, apparently determined claimant's testimony to be lacking. The replacement glasses were made available in the office. Claimant had not only the night of October 17, 2013, to obtain replacements, but also before his shift on October 18, 2013. His only excuse was that he was on work release. It is difficult to imagine claimant was only allowed to arrive at work moments before his shift, so as to prevent him from obtaining the replacement glasses. The ALJ determined claimant's actions were reckless. He determined the risk that an object may hit claimant in the eye if safety glasses were not worn is an obvious risk.

This Board Member agrees. Claimant's actions went beyond mere negligence. They constituted an act which involved a known or obvious risk. The denial of benefits in this instance is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

[7] K.S.A. 2013 Supp. 44-534a.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Claimant's actions went beyond mere negligence. They were reckless beyond the actions expected of a reasonable person. Claimant had ample opportunity to obtain the replacement glasses and chose not to do so.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Gary K. Jones dated January 29, 2014, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2014.

_____
HONORABLE GARY M. KORTE
BOARD MEMBER

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Gary K. Jones, Administrative Law Judge